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Convictions of Innocent People with Intellectual Disability

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CONVICTIONS OF INNOCENT PEOPLE WITH INTELLECTUAL DISABILITY

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INTRODUCTION

In *Atkins v. Virginia*,[1] the Supreme Court held that executing individuals with intellectual disability violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.[2] Such executions are inherently excessive primarily because individuals with intellectual disability, as a class, do not have sufficient moral culpability to make them deserving of the most serious punishment.[3] In reaffirming this decision in *Hall v. Florida*,[4] the Supreme Court noted that "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[5]

Atkins stressed that individuals with intellectual disability "have diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[6] This, in turn, reduces the retributive and

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[*] James and Mark Flanagan Professor of Law, Cornell Law School. The authors wish to thank Yangji Sherpa for her excellent research assistance. This essay is dedicated to the memory of Eddie Elmore, who died on December 3, 2018. Eddie, a person with intellectual disability, was released from prison in 2013 after serving thirty-two years in prison for a crime he did not commit. He was a kind, gentle soul, who carried no grudges to his grave as a result of his decades of wrongful imprisonment. He will be missed.

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[1] Atkins v. Virginia, 536 U.S. 304 (2002).

[2] *See id.* at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[3] *See Atkins*, 536 U.S. at 318.

[4] Hall v. Florida, 572 U.S. 701 (2014).

[5] *Id.* at 708 (citing *Atkins*, 536 U.S. at 317, 320).

[6] *Atkins*, 536 U.S. at 318, 320 ("[Their] diminished ability to . . . process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").

deterrent purposes of capital punishment due to the fact that persons with intellectual disability have significantly reduced moral culpability due to their cognitive limitations and also makes it less likely that they will be able "to make the calculated judgments that are the premise for the deterrence rationale."[7]

The Court's judgment in *Atkins* was also informed by a concern unrelated to culpability or deterrence: the heightened "risk of wrongful execution" faced by persons with intellectual disability.[8] *Atkins* listed multiple factors that increase the risk that an innocent person with intellectual disability may be convicted: they are more likely to confess falsely to a crime they did not commit; they often have difficulty communicating favorable information to their attorneys; they typically make poor witnesses (and thus rarely are able to testify, or testify persuasively, in their own defense); and, their demeanor can convey a false sense of lack of remorse.[9] The Court concluded that these class characteristics reinforced its determination that the death penalty is an excessive punishment for persons with this profound disability.[10]

The Court's description in *Atkins* of the heightened risk of wrongful conviction and execution facing persons with intellectual disability struck us as right at the time it was made based on clients we had represented wearing our litigation hats. In fact, as fate would have it, at the time the Court decided to re-visit the categorical bar to execution for persons with (then known as) mental retardation, two of the authors were deep in pre-trial proceedings in the case of the *State (of South Carolina) v. Johnny Ringo Pearson*.[11] Based on our investigation, we believed that our client–"Ringo to his family"–was such a person. The state court stayed the proceedings pending the United States Supreme Court's resolution of the Eighth Amendment issue, and then, after the Court issued its decision in *Atkins* we conducted one of the very first *Atkins* Hearings.[12] After multiple days of testimony, the judge determined that Ringo was a person with intellectual disability and quashed the state's notice of intent to seek the death penalty.[13]

But, for a variety of reasons, we were also convinced Ringo was

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[7] *Hall*, 572 U.S. at 709 (citing *Atkins*, 536 U.S. at 319).

[8] *Atkins*, 536 U.S. at 321.

[9] *See id.* at 320–21.

[10] *See id.*

[11] *See* John H. Blume, *Intellectual Disability, Innocence, Race, and the Future of the American Death Penalty*, 42 HUM. RTS. 10, 11 (2016).

[12] *See id.*

[13] *See id.*

innocent. His confessions matched neither the physical evidence nor the prosecution's theory of the case,[14] a problem which surprisingly did not seem to bother the prosecutors. Moreover, the other main piece of evidence allegedly linking the murder to Ringo, who is African American, was the testimony of two other persons initially charged with the crime but then given immunity in exchange for their testimony—both of whom were white.[15] Their statements were not only inconsistent with Ringo's statements, but also struck us as highly implausible, even ludicrous.[16] Another piece of evidence the prosecution intended to offer was a "duct tape expert", who was prepared to testify that duct tape found on the victim's body "matched" a roll of duct tape found in Ringo's car.[17] Thus, in our view, the prosecution's case rested on the "holy trinity" of false confessions, snitches, and junk science, all fueled by some good old fashioned Southern racism.

On the eve of trial, the prosecutors approached us with a "deal" that was "too good to turn down" given the risk of a death sentence; they offered to drop the murder charge if Ringo would plead guilty to manslaughter, which, given the (extraordinary) length of his pre-trial confinement, meant he was almost immediately eligible for release.[18] We explained this to Ringo, and he entered an *Alford* plea to the lesser included offense.[19] Ringo was released many years ago and is doing well, but his case is not the only one in which we have represented an innocent, intellectually disabled defendant.[20]

Our experience with several such defendants led us to ask how frequent such cases are. This essay explores that question both anecdotally and quantitatively, hoping to illuminate the causes of wrongful conviction of persons with intellectual disability. We

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[14] *See id.*

[15] *See id.*

[16] *See* State v. Stuckey, 556 S.E.2d 403, 406–07, 408 (S.C. Ct. App. 2001).

[17] *See id.* at 406.

[18] *See* Blume, *supra* note 11, at 11. This is not an uncommon ploy by prosecutors and state attorneys general in weak cases. *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 158, 160–61, 180 n.144 (2014).

[19] *See* Ian McGullam, *Generations of Capital Punishment Clinic Students Fight for Johnny Ringo Pearson*, CORNELL L. SCH. (Oct. 16, 2013), https://www.lawschool.cornell.edu/spotlights/Generations-of-Capital-Punishment-Clinic-Students-Fight-for-Johnny-Ringo-Pearson.cfm. An *Alford* plea is a form of guilty plea in which defendants maintain their innocence but agree that there is enough evidence against them to convict. *See* Sydney Schneider, Comment, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279, 279 (2013).

[20] *See, e.g.*, Blume, *supra* note 11, 11–12.

provide examples from our experiences in the Cornell Death Penalty Clinic and cases brought to our attention by defense attorneys.[21] We also present data from the National Registry of Exonerations.[22] Then we turn to the causes of the disproportionate wrongful conviction of intellectually disabled persons and conclude by considering implications of those causes for reform.

I. ESTIMATING THE NUMBER OF WRONGFUL CONVICTIONS OF PEOPLE WITH INTELLECTUAL DISABILITY

In this essay we build on previous work highlighting the heightened risk for individuals with intellectual disability to be wrongfully convicted, particularly due to the risk of false confessions. We have compiled a list of individuals that are likely to be people with intellectual disability charged with crimes for which they are innocent, drawing from multiple sources: The National Registry of Exonerations, previous lists published by Robert Perske,[23] and previous research on false confessions by Steven Drizin, Richard Leo, and Richard Ofshe,[24] our own work, and communication with other attorneys.

The National Registry of Exonerations (NRE) records detail information about every known exoneration in the United States since 1989.[25] The NRE records include one variable that tracks whether there is evidence that the person has mental illness and/or

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[21] *See* app.

[22] *See generally*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Feb. 23, 2019) ("The National Registry of Exonerations is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongful convicted of a crime and later cleared of all the charges based on new evidence of innocence.").

[23] *See* Robert Perske, *Perske's List: False Confessions from 75 Persons with Intellectual Disability*, 49 INTELL. & DEVELOPMENTAL DISABILITIES 365 (2011) [hereinafter Perske, *False Confessions from 75 Persons*]; Robert Perske, *False Confessions from 53 Persons with Intellectual Disabilities: The List Keeps Growing*, 46 INTELL. & DEVELOPMENTAL DISABILITIES 468 (2008) [hereinafter Perske, *False Confessions from 53 Persons*].

[24] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 971 n.453 (2004) (listing suspects with intellectual disability who falsely confessed); Richard A. Leo & Richard J. Ofshe, *Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 435–36 (1998) (describing probable false confessions, including by people with intellectual disability).

[25] *See* NAT'L REGISTRY EXONERATIONS, *supra* note 22.

intellectual disability.[26] As of February 2019, there are 146 individuals that fit into this category.[27] The authors reviewed case information provided by the NRE and parsed out the intellectual disability and mental illness variable. We identified 101 individuals of the 146 where there was evidence of intellectual disability or learning disabilities.[28]

The crimes for which people with intellectual disability have been exonerated are concentrated among the worst crimes, as displayed in Table 1. Most exonerees with intellectual disability are exonerated for the crime of murder (69%), as is also true for anyone with mental disability (66%), but as is not true for all exonerees (38% exonerated for murder).[29]

Table 1. Exonerations by Worst Crime

	Total $N = 2358$	Any Mental Disability $n = 146$	Intellectual Disability $n = 101$
Murder	897 (38%)	97 (66%)	70 (69%)
Sexual Assault	303 (14%)	18 (12%)	12 (12%)
Child Sex Abuse	250 (11%)	15 (10%)	11 (11%)
All other cases	875 (62%)	16 (11%)	8 (8%)[30]

Note: Data from National Registry of Exonerations. The intellectual disability variable was created by the authors based on information from the NRE.

A charitable explanation is possible: in murder cases, the importance of mitigating factors during sentencing makes it more likely that intellectual disability will be investigated and uncovered in those case.[31] Given the limited information available about most of the exonerations and the fact that the mental disability variable is still being coded, we can't rule out this explanation. Another, less benign explanation is that because there is so much more at stake in investigations and prosecutions for murder than for lesser crimes, authorities may put more pressure on defendants to confess to clear

[26] *See infra* Table 1.

[27] This variable is still being reviewed and more individuals may be added in the future.

[28] *See infra* Table 1.

[29] *Id.*

[30] The remaining eight exonerees with intellectual disability were convicted of eight different crimes. These crimes include: Robbery, Assault, Attempted Murder, Manslaughter, Weapon Possession or Sale, Arson, Kidnapping, and Child Abuse.

[31] *See* HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 5, 19 (2001).

them.[32] Relatedly, those higher stakes may cause greater reliance on informants, or greater willingness to credit the stories of smarter alternative suspects, techniques for which innocent individuals with intellectual disability are particularly vulnerable.[33]

Table 2. Exonerations by Sentence of People Convicted of Murder

	Total $n = 897$	Any Mental Disability $n = 97$	Intellectual Disability $n = 70$
Death	121 (13%)	26 (27%)	20 (29%)
Life Without Parole	120 (13%)	15 (15%)	13 (19%)
Life	250 (28%)	23 (24%)	15 (21%)
Term of Years	391 (44%)	33 (34%)	22 (31%)

Note: Data from National Registry of Exonerations. The intellectual disability variable was created by the authors based on information from the NRE.

Among exonerees of murder, the more extreme the punishment, the more likely we are to see an individual with a mental disability, including intellectual disability.[34] Overall, in 13% of exonerations for murder, the individual was sentenced to death.[35] When we focus on individuals with mental disability and more specifically, intellectual disability, there is a larger portion sentenced to death (27% and 29%, respectively).[36]

Table 3 displays the demographic data of exonerees. Exonerees with intellectual disability are mostly male (93%), as are exonerees generally (91% of all exonerees are male). Exonerees with intellectual disability are somewhat more likely to be black (55%) [37] and juveniles at the time of the crime (25%), compared to exonerees with no documented intellectual or mental disability (47% black and

[32] *See* Drizin & Leo, *supra* note 24, at 946; Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 478, 481, 484–85 (1996).

[33] *See* Gross, *supra* note 32, at 481, *infra* Part II.D.

[34] *See supra* Table 2.

[35] *Id.*

[36] *Id.* Six exonerated people were under 18 at the time of the crime and sentenced to death (two of whom were people with intellectual disability). These convictions occurred before the Supreme Court's decision in *Roper v. Simmons*, which found the practice to be unconstitutional. Roper v. Simmons, 543 U.S. 551, 575 (2005). If we exclude all people under 18 at the time of the crime, the percentage of murderers who were sentenced to death is 15% (all), 31% (mental disability), 31% (intellectual disability). See *infra* Table 3 for counts of people under 18.

[37] *See infra* Table 3.

8% under 18).[38] This raises the possibility that the combination of race, youth, and intellectual disability may further increase the vulnerability to wrongful conviction.[39]

Table 3. Demographic Information of Exonerations

	Total $N = 2358$	Any Mental Disability $n = 146$	Intellectual Disability $n = 101$
Under 18	209 (9%)	31 (21%)	25 (25%)
Male	2145 (91%)	133 (91%)	94 (93%)
White	903 (38%)	63 (43%)	36 (36%)
Black	1120 (47%)	71 (49%)	56 (55%)
Hispanic	280 (12%)	11 (8%)	9 (9%)
Other	55 (2%)	1 (1%)	0 (0%)

Note: Data from National Registry of Exonerations. The intellectual disability variable was created by the authors based on information from the NRE.

The NRE data is under-inclusive because it does not include individuals, like Johnny Ringo Pearson, who presented a strong showing of innocence, but were not officially exonerated.[40] Data from research by Steven Drizin, Richard Leo, and Richard Ofshe reveals some of them. Leo and Ofshe described sixty cases where an individual was arrested primarily because of a confession that later was proven, or highly likely, to be false. Many of these individuals were never formally exonerated and therefore were not included in the NRE database.[41] While Leo and Ofshe did not discuss intellectual disability specifically, it was mentioned in the descriptions of fifteen cases.[42] Six of these cases were not in the NRE database. Drizin and Leo focused on innocent defendants who had falsely confessed as

[38] *See id.*; NRE database (on file with authors).

[39] *See* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 308 (2006) ("[P]rolonged interrogation—especially in conjunction with youthfulness, mental retardation, or other psychological vulnerabilities—is strongly associated with eliciting false confessions.").

[40] *See* NAT'L REGISTRY EXONERATIONS, *supra* note 22; *Glossary*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Apr. 13, 2019).

[41] *See* Leo & Ofshe, *supra* note 24, at 435–36.

[42] *Id.* at 459–60, 461–62, 465–66, 466–67, 468–69 479–80, 481, 485, 487, 490 (identifying Richard LaPointe, Jessie Misskelley, Jr., Douglas Warney, Barry Lee Fairchild, Delbert Ward, Jack Carmen, David Vasquez, Johnny Lee Wilson, William Kelley, Christopher Smith, Ralph Jacobs, John Purvis, Melvin Lee Reynolds, Earl Washington, and Juan Rivera as people with intellectual disability (or "mentally handicapped")).

demonstrated by at least one piece of dispositive evidence; they found 125 such individuals, including many not formally exonerated.[43] Drizin and Leo identified 28 of these individuals as people with intellectual disability.[44] Nineteen were not in the NRE database. Robert Perske built on the research of Drizin and Leo, identifying additional cases of individuals with intellectual disability who had confessed to crimes and were later proven to be innocent.[45] He published a list of 75 exonerated individuals with intellectual disability.[46] This included an additional 28 people who were not included in the previous research or the NRE database. Taken together, these articles identify 53 individuals not included in the NRE database who are likely to be people with intellectual disability who were convicted of serious felonies that they did not commit. Our communication with defense attorneys revealed an additional 18 people with evidence of intellectual disability and innocence.[47]

In total, we have identified 172 individuals with documented claims of intellectual disability and innocence. This is almost certainly an underestimate because individuals with intellectual disability often go to great lengths to conceal their disability, hiding behind a "cloak of competence."[48] The cloak of competence can make

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[43] *See* Drizin & Leo, *supra* note 24, at 924–25, 951.

[44] *Id.* at 971 n.453 (listing Medell Banks, Victoria Banks, Leonard Barco, Corey Beale, Corethian Bell, Melvin Bennett, Keith Brown, Rodney Brown, Timothy Brown, Allen Chesnut, Antwon Coleman, Ricky Cullipher, Gerald Delay, Michael Fitzpatrick, Michael Gayles, Hubert Geralds, Anthony Gray, Paula Gray, Charles King, Johnny Massingale, Calvin Ollins, Don Olmetti, Ronald Paccagnella, Patrick Smith, Jerry Frank Townsend, Dianne Tucker, Robert Wilkinson, and Fred Williams as people with intellectual disability). None of these people were included in Leo and Ofshe's list. *See supra* note 42.

[45] *See* Perske, *False Confessions from 53 Persons*, *supra* note 23, at 468.

[46] Perske, *False Confessions from 53 Persons*, *supra* note 23, at 468 (listing Eunice Baker, Floyd Lee Brown, Ozem Goldwire, Robert Gonzales, Ladell Hughes, Harold Israel, Terric Jeffrey, Matthew Livers, Godfrey Miller, Brian Oltmanns, Roberto Rocha, Donald Shoup, and Charles Singletary); Perske, *False Confessions from 75 Persons*, *supra* note 23, at 365 (adding to the list of 53 and including Joseph Arridy, Jesse Barnes, Jerome Bowden, Earl Correll, Anthony Dansberry, Girvies Davis, Eddie Elmore, Charles Hickman, Tommy Lee Hines, Lebrew Jones, Tyler Sanchez, Antonio Santiago, Cornelius Singleton, James Thompson, Jr., and Lourdes Torres).

[47] *See* app. (describing cases identified by attorneys). We included cases where (1) there is documented evidence consistent with intellectual disability (e.g. IQ scores below 70 and deficits in adaptive functioning) even if the court did not find that the person has intellectual disability and (2) there is evidence in support of innocence or evidence discrediting the State's main evidence of guilt. *See, e.g.*, Leo & Ofshe, *supra* note 24, at 435–36 (including cases where innocence was "proven," "highly probable," and "probable"). There were additional cases of individuals with intellectual disability who maintained their innocence but were found guilty largely based on confessions they made in response to suggestive police interrogations. While there is reason to doubt these confessions, see *infra* section II.A, we did not include these cases on our list unless there is additional evidence disputing their confessions.

[48] *See* HUMAN RIGHTS WATCH, *supra* note 31, at 12. ("Since mentally retarded people are

it very difficult for their lawyers to identify the intellectual disability, especially if the individual is in the mild range.[49] It has been our experience, which we have detailed elsewhere, that limited resources and expertise lead lawyers—even experienced capital defense lawyers—to miss red flags of intellectual disability and thus fail to raise the issue at trial or in state and federal post-conviction appeals.[50] It can take years for the facts of intellectual disability to be uncovered.[51] Of the NRE exoneree list of 2,212 individuals with no established mental disability, we are confident there are many who in fact are people with intellectual disability.[52]

In the remaining sections, we will present our analysis of the NRE's detailed data to explore the various factors contributing to the wrongful convictions. We will also provide case examples from the additional cases we identified through our supplemental inquiries to practitioners.

II. CAUSES OF WRONGFUL CONVICTIONS

Certain deficits that are common in people with intellectual disability can exacerbate the risk of wrongful conviction. In this section, we briefly describe the clinical definition of intellectual disability and the deficits that correlate with some causes of wrongful conviction.

Intellectual disability involves substantial limitations in present functioning characterized by three prongs: deficits in intellectual functioning and adaptive functioning, and manifestation of these deficits in childhood.[53] Intellectual functioning, the first prong of the

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often ashamed of their own retardation, they may go to great lengths to hide their retardation, fooling those with no expertise in the subject. They may wrap themselves in a 'cloak of competence,' hiding their disability even from those who want to help them, including their lawyers. Overworked or incompetent lawyers may overlook evidence of retardation and fail to request a psychological evaluation or raise the issue during trial. At times, even competent lawyers who are anxious to help their clients may fail to identify their clients' retardation or may be unable to access funds for a psychological evaluation.").

[49] *See infra* notes 53–56 and accompanying text for a discussion of mild intellectual disability.

[50] *See* Sheri Lynn Johnson et al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107, 1107, 1109, 1113–17 (2018); *see also* Blume, *supra* note 11, at 12 (discussing how the needed expertise and funding is substantially higher when a client has an intellectual disability).

[51] *See* Blume, *supra* note 11, at 13.

[52] *See supra* Table 1.

[53] *See* Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002); AM. ASS'N INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter AAIDD] ("*Intellectual disability* is a disability characterized by significant limitations in both intellectual functioning and

clinical definition, is largely based on IQ scores.[54] Adaptive functioning, the second prong, measures the ways in which the intellectual deficits affect the individual's ability to function in life.[55] This portion of the definition requires that an individual's diminished intellectual functioning involves actual impairment in the skills involved in everyday living.[56]

Approximately 75% of people with intellectual disability fall within the mild range, generally defined by an I.Q. score between 55 and 75.[57] Criminal defendants are more likely to have mild intellectual disability than moderate or severe because persons who are more impaired are rarely subject to criminal proceeding: they are not likely to commit crimes due to the nature of their disability, and, if they do, they are more likely to be found not competent to stand trial, or to lack criminal responsibility.[58]

Mild intellectual disability is easy to overlook or misunderstand because of its lack of a specified etiology and the likelihood that individuals in this category often will not meet preconceived notions of intellectual disability.[59] Individuals with mild intellectual disability often do not have identifiable characteristics that the public may associate with the disability and they are likely to have

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in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18."); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM-5] ("Intellectual disability . . . is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."); Johnson et al., *supra* note 50, at 1110 (explaining that intellectual disability has three main criteria for diagnosis.).

[54] *See* John H. Blume et al., *The American Experience with the Categorical Ban Against Executing the Intellectually Disabled: New Frontiers and Unresolved Questions*, *in* VAGUENESS IN PSYCHIATRY 222, 224–25 (Geert Keil et al. eds., 2017); NAT'L ACAD. OF SCI., ENGINEERING & MED., MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN 169–70 (Thomas F. Boat & Joel T. Wu eds., 2015).

[55] *See Atkins*, 536 U.S. at 308 n.3 (discussing adaptive functioning as deficiencies in everyday skills); *see also* Johnson et al., *supra* note 50, at 1110 (discussing the three prongs of intellectual disability diagnosing criteria).

[56] DSM-5, *supra* note 53, at 33; AAIDD, *supra* note 53.

[57] *See* MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 102 (2018); NAT'L ACAD. OF SCI., ENGINEERING & MED., *supra* note 54, at 171 tbl.9-1.

[58] *See* TASSÉ & BLUME, *supra* note 57, at 10; Frank M. Gresham, *Interpretation of Intelligence Test Scores in* Atkins *Cases: Conceptual and Psychometric Issues*, 16 APPLIED NEUROPSYCHOLOGY 91, 92 (2009); J. Gregory Olley, *Knowledge and Experience Required for Experts in* Atkins *Cases*, 16 APPLIED NEUROPSYCHOLOGY 135, 136 (2009); Octavia Gory, Note, *Safeguarding the Constitutional Rights of the Intellectually Disabled: Requiring Courts to Apply Criteria That Do Not Deviate from the Current Edition of the DSM*, 24 WIDENER L. REV. 155, 161 (2018).

[59] *See* Gresham, *supra* note 58, at 92.

some skills that appear to be above the cutoff for the diagnosis.[60] Although every person with an intellectual disability will lack some basic skills and abilities that nondisabled individuals typically possess, not every individual with an intellectual disability will be limited in the same way.[61] A fundamental precept of the field of intellectual disability is that "[w]ithin an individual, limitations often coexist with strengths."[62] Because the mixture of skills and skill deficits varies widely among persons with an intellectual disability, there is no clinically accepted list of common, ordinary skills or abilities that preclude a diagnosis of intellectual disability.[63]

Common deficits, such as substantial limitations in social skills,[64] working memory,[65] and managing stress[66] can cause different vulnerabilities within the criminal justice system.[67] Deficits in social skills affect interactions with police during interrogations, relationships with the defense team, and presentation of self to the jury during trial.[68] Deficits in working memory can impair an

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[60] *See* Olley, *supra* note 58, at 136–37.

[61] *See Frequently Asked Question on Intellectual Disability*, AM. ASS'N INTELL. & DEVELOPMENTAL DISABILITIES, https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability (last visited Apr. 13, 2019).

[62] *See Introduction to Intellectual and Developmental Disabilities*, ARC (Aug. 2009), http://www.thearcjackson.org/Introductiontoidd8-11.pdf (citing to the language of the AAIDD to define intellectual disability).

[63] *See* Olley, *supra* note 58, at 137; *see also* NAT'L ACAD. OF SCI., ENGINEERING & MED., *supra* note 54, at 170 (discussing that people can be diagnosed as intellectually disabled, even if they do exhibit everyday skills).

[64] *See* HUMAN RIGHTS WATCH, *supra* note 31, at 14 ("[P]eople with mental retardation often miss social 'cues' that other adults understand. Their inappropriate social responses can be misinterpreted by people who do not know they have mental retardation or who do not understand the nature of retardation. They may act in ways that seem suspicious, even when they have done nothing wrong. When questioned by police or other authority figures, they often smile inappropriately, fail to remain still when ordered to do so, or act agitated and furtive when they should be calm and polite. Others may fall asleep at the wrong moment.").

[65] *See* Nigel Beail, *Interrogative Suggestibility, Memory and Intellectual Disability*, 15 J. APPLIED RES. INTELL. DISABILITIES 129, 131 (2002); Gisli H. Gudjonsson & Lucy Henry, *Child and Adult Witnesses with Intellectual Disability: The Importance of Suggestibility*, 8 LEGAL & CRIMINOLOGICAL PSYCHOL. 241, 243 (2003); *see also* Kristen Schuchardt et al., *Working Memory Functions in Children with Different Degrees of Intellectual Disability*, 54 J. INTELL. DISABILITY RES. 346, 348 (2010) (explaining a study developed to identify specific memory deficits in intellectual disability children).

[66] *See* Gudjonsson & Henry, *supra* note 65, at 243; *see also* Haleigh M. Scott & Susan M. Havercamp, *Mental Health for People with Intellectual Disability: The Impact of Stress and Social Support*, 119 AM. J. INTELL. & DEVELOPMENTAL DISABILITIES 552, 552 (2014) ("[I]ndividuals with [intellectual disability] may be at greater risk for experiencing stress than their counterparts without a disability . . . .").

[67] *See* Jane A. McGillivray & Barry Waterman, *Knowledge and Attitudes of Lawyers Regarding Offenders with Intellectual Disability*, 10 PSYCHIATRY PSYCHOL. & L. 244, 244 (2003).

[68] AAIDD, *supra* note 53 ("[P]articularly relevant for criminal defendants are deficits in adaptive behavior, which can include social skills such as interpersonal skills, gullibility,

innocent person's ability to resist police pressure to confess during an interrogation, assist counsel, and testify in their own defense.[69] Difficulties managing stress and coping to unfamiliar demands can make them vulnerable during police interrogations, make them poor witnesses at trial, and may lead them to act inappropriately during trial.[70]

We now turn to how those characteristics produce wrongful convictions. Here we elaborate on our earlier work,[71] considering additional data from the NRE database and examples from our own data.

A. False Confessions

The best-documented cause of wrongful conviction among people with intellectual disability is false confessions.[72] This is also the first cause of wrongful conviction discussed in *Atkins v. Virginia*.[73] As displayed in Table 3, individuals with mental disability, and more specifically, intellectual disability, are wildly overrepresented among

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naïveté, social problem solving, and the ability to follow rules."); Gudjonsson & Henry, *supra* note 65, at 247 ("[I]nterestingly, even though the memory scores of the children and adults on the GSS 2 were consistently low, the suggestibility scores had a much greater range, highlighting the enormous individual differences in suggestibility among the moderately intellectually disabled."); McGillivray & Waterman, *supra* note 67, at 244–45.

[69] *See* Atkins v. Virginia, 536 U.S. 304, 320–21 (2002); Gudjonsson & Henry, *supra* note 65, at 243; McGillivray & Waterman, *supra* note 67, at 245.

[70] *See* Gudjonsson & Henry, *supra* note 65, at 249 ("There is no doubt that the stress and demands associated with testifying in court, whether as a witness, victim, or suspect, can undermine the potential value of the testimony and the credibility of the witness. . . . The problems . . . relate to lawyers' use of complicated language, which often confuses witnesses, heavy reliance on closed and leading questions, and focusing unduly on peripheral information that witnesses have difficulties in remembering. The consequences of using these tactics when cross-examining witnesses are likely to be particularly serious when applied to people with learning disabilities, because of their specific vulnerabilities relating to poor vocabulary and memory capacity, as well as heightened suggestibility and acquiescence during questioning."); *see also* McGillivary & Waterman, *supra* note 67, at 245 (explaining that people with intellectual disability may be more anxious and confused by an interrogation process and will then confess to a crime they did not commit).

[71] *See* John H. Blume et al., *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y. L. SCH. L. REV. 943, 951–58 (2012).

[72] *See* Drizin & Leo, *supra* note 24, at 969, 971–72 (finding 28 of their 125 false confessions were stated by people with intellectual disability, including the case of Michael Gayles: an eighteen year old with an IQ of seventy-one and a learning disability); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005) (showing that 69% of persons exonerated by DNA who had mental disabilities were wrongfully convicted because of false confessions); Perske, *False Confessions from 75 Persons*, *supra* note 23, at 365; Samson J. Schatz, Note, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643, 645 (2018).

[73] *See* Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

exonerated people who have falsely confessed.[74] While only 12% of the entire sample of exonerees falsely confessed, 71% of the exonerees with intellectual disability confessed.[75] (Put another way, 25% of the exonerees who falsely confessed had intellectual disability, a finding which is consistent with previous research.[76]) This risk seems particularly great among the young: of the twenty-five exonerated juveniles with intellectual disability, twenty-one (84%) confessed.[77] Notably, individuals with intellectual disability are not significantly overrepresented among causes of wrongful conviction that are unconnected to intellectual disability such as mistaken eyewitness identification and faulty forensic evidence.[78]

Table 4. Exonerations by Contributing Factor

	Total $N = 2358$	Any Mental Disability $n = 146$	Intellectual Disability $n = 101$
False Confession	287 (12%)	101 (69%)	72 (71%)
Mistaken Witness Identification	671 (28%)	29 (20%)	21 (21%)
Faulty Forensic Evidence	551 (23%)	33 (23%)	20 (20%)

Note: Data from National Registry of Exonerations. The intellectual disability variable was created by the authors based on information from the NRE.

Other empirical studies also find an increased risk of false confessions among individuals with intellectual disability,[79] especially juveniles with intellectual disability.[80] Two factors contributing to this increased risk of false confession are increased susceptibility to police interrogation tactics and decreased

[74] *See supra* Table 3.

[75] *See infra* Table 4.

[76] *See id.*; Drizin & Leo, *supra* note 24, at 971, 973.

[77] *See supra* Table 3; NRE database (on file with authors).

[78] *See infra* Table 4.

[79] *See* Gudjonsson & Henry, *supra* note 65, at 241 ("Children and adults with learning disability have much poorer memory and higher suggestibility scores than their contemporaries of normal intelligence. Differences in suggestibility are only partly explained by poorer memory scores. The findings reveal important differences between children and adults with intellectual disabilities. Children with learning disabilities are more susceptible to altering their answers under pressure than are adults with learning disabilities.").

[80] *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 19 (2010); Blakely Lloyd, Note, *Making an Involuntary Confession: An Analysis of Improper Interrogation Tactics Used on Intellectually Impaired Individuals and Their Role in Obtaining Involuntary Confessions*, 42 LAW & PSYCHOL. Rev. 117, 127 (2018).

understanding of the *Miranda* warnings.[81] The potential psychological coerciveness of police interrogations has concerned courts for nearly a century, but the measures designed to protect individual rights—in particular, *Miranda* warnings—are not designed for people with diminished cognitive functioning.[82]

Police interrogations are designed to persuade a suspect to confess by "manipulat[ing] the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action."[83] Individuals with deficits in managing stress and decreased social skills can be particularly susceptible to social pressure and more likely to acquiesce to interrogators' demands, which produces statements that are consistent with the interrogators' beliefs rather than the suspects' memories.[84] Difficulties managing stress may increase the likelihood that innocent victims may succumb to social pressure during interrogation, if only to end the prolonged interrogation.[85]

Interrogators, who often have already concluded that the suspect is guilty,[86] alert the suspect to their beliefs by repeating specific information and selectively reinforcing the suspect's statements.[87] Police may even lie about the existence of persuasive evidence against the suspect in order to persuade the suspect that there is no way out.[88] Police can convince suspects that confessing will improve their situation by threatening them with punishment if they do not confess or promising them rewards if they do confess.[89] These types

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[81] *See* Lloyd, *supra* note 80, at 127–28.

[82] *See id.*; Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

[83] Richard J. Ofshe & Richard A. Leo, *Coerced Confessions: The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997).

[84] *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 824 (2006); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 127 (1996).

[85] *See* Kassin et al., *supra* note 80, at 14.

[86] *See* Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION 207, 214 (Tom Williamson ed., 2006); *see also* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 78 (4th ed. 2001) ("The successful interrogator must possess a great deal of inner confidence in [their] ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness.").

[87] *See* Kassin, *supra* note 86, at 223.

[88] *See* Robert Perske, *Deception in the Interrogation Room: Sometimes Tragic for Persons with Mental Retardation and Other Developmental Disabilities*, 38 MENTAL RETARDATION 532, 534 (2000) [hereinafter Perske, *Deception in the Interrogation Room*]; Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 786 (1997).

[89] *See* Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. CRIM. L. &

of techniques are particularly persuasive for individuals with reduced working memory capacity (which leads to increased uncertainty about their memories) and heightened trust of authority.[90]

Police interrogation techniques may also affect cognition by convincing people with poor memory that they are guilty even though they have no memory of committing the crimes in question.[91] Police often encourage this belief by telling suspects they may have repressed their memories of the crime.[92] Suspects who already distrust their memory—a trait often possessed by persons with intellectual disability because their memories are in fact undependable—may come to believe that they may have committed the crimes despite no actual memory of having done so.[93]

Individuals with intellectual disability frequently have difficulty understanding abstract concepts, including their legal rights and the *Miranda* warnings.[94] Studies measuring comprehension of *Miranda* warnings consistently find that individuals with intellectual disability have deficient understanding of those warnings.[95] Individuals with intellectual disability are also less likely to seek assistance of family or friends during interrogations, often because they do not know how to reach them.[96]

The vulnerability of people with intellectual disability to repeated police interrogations is exemplified by the experience of one of our clinic clients, Kenneth Simmons, who was convicted and sentenced to death in connection with the rape and murder of eighty-seven year old Lily Bell Boyd.[97] At trial the prosecution relied on two categories

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CRIMINOLOGY 266, 278–79 (1996) ("If a portrait of the typical interrogation emerges from the data, it involves a two-prong approach: the use of negative incentives (tactics that suggest the suspect should confess because of no other plausible course of action) and positive incentives (tactics that suggest the suspect will in some way feel better or benefit if he confesses).").

[90] *See* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 335–36 (2009); Perske, *Deception in the Interrogation Room*, *supra* note 88, at 532.

[91] *See* Amelia Courtney Hritz, Note, *"Voluntariness with a Vengeance": The Coerciveness of Police Lies in Interrogations*, 102 CORNELL L. REV. 487, 506 (2017).

[92] *See id.* at 505–06; Ofshe & Leo, *supra* note 83, at 1000.

[93] *See* Kassin et al., *supra* note 80, at 15 (stating that suspects may be less trusting of their memory due to young age, mental illness, intellectual disability, or a history of drug and alcohol abuse).

[94] *See* Lloyd, *supra* note 80, at 128.

[95] *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 499 (2002); Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212 (1999).

[96] *See* Cloud et al., *supra* note 95, at 514.

[97] *See* State v. Simmons, 599 S.E.2d 448, 449 (S.C. 2004).

of evidence: (1) DNA test results which, in the prosecution's view, conclusively identified Simmons as the perpetrator; and (2) Simmons' multiple confessions.[98] Despite a vigorous defense, Simmons was found guilty and sentenced to death.[99] We became involved in the case after his convictions and death sentence were affirmed on direct appeal, and after *Atkins* established the Eighth Amendment ban against executing persons with intellectual disability.[100] Proving that Kenneth fell into the protected category was a (relatively) straightforward proposition. The State would not concede that he was a person with intellectual disability, relying on the irrelevant fact that he had been a "star" football player in high school.[101] One of our former clinic students assumed Kenneth's representation and began to scrutinize the evidence supporting his conviction.

In the first three (of six) interrogations, Kenneth "confessed" to knowing about or participating in three other murders—all three of which were later determined to be fictional. In interrogation four, law enforcement was able to get him to admit that he knew something about some other people having committed Boyd's murder, although his account was bizarre, incoherent, and conflicted with known facts about the crime.[102] In the fifth interrogation, Kenneth confessed to the Boyd murder—again with several factual inaccuracies, albeit fewer than in his previous statement. During the sixth interrogation, he was shown a written transcript of the "recap" from his statement in the fifth interview and asked to agree that it was correct, which he did despite the fact that he only reads and writes at a third-grade level.[103]

Experts agreed that Kenneth's confessions bore all the hallmark features of false confessions made by a person with intellectual disability, but that still left the DNA.[104] A re-analysis of that evidence by competent, neutral experts uncovered that the state's DNA experts testified at trial that certain tests showed a conclusive "match" to Simmons when, in fact, the DNA results they obtained from those tests matched only the victim's own DNA and did not

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[98] *See id.* at 450.

[99] *See id.* at 449.

[100] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[101] *See* Blume, *supra* note 11, at 12.

[102] *See* Brief of the Arc of S.C. et al. as Amici Curiae Supporting Petitioner at 5, 14, Simmons v. State, 788 S.E.2d 220 (S.C. 2016) (No. 05-CP-1368) [hereinafter Amicus Brief of the Arc of S.C.].

[103] *See id.* at 12–13.

[104] *See id.* at 3–5, 12.

match Simmons' at all.[105] It was also revealed that the prosecution's forensic experts withheld evidence that directly contradicted their trial assertions that the evidence contained a testable mixture of DNA (rather than simply the victim's own, single-source sample).[106] Finally, the State had suppressed test results showing that the evidence contained only female DNA.[107] Simmons' conviction was ultimately vacated given the erosion of the two pillars of the prosecution's case against him—just one of many other examples of individuals with intellectual disability who have falsely confessed.[108]

B. Difficulties Assisting Counsel

Most of our clients with intellectual disability over the years, regardless of whether they were innocent or guilty, provided minimal assistance to the defense effort. Deficits in memory, language, and the ability to understand abstract legal concepts and ideas can make it difficult to maintain focus and assist counsel.[109] While there may be some exceptions (a caveat required because persons with intellectual disability have strengths and weaknesses), our experience has been that the cognitive limitations present in all persons with intellectual disability make it difficult for them to remember events accurately and provide information to the defense team in a coherent manner.[110] This makes investigation more difficult and limits their ability to testify at trial.

Ringo Pearson, for example, had no real sense of time, and when

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[105] *See* Simmons v. State, 788 S.E.2d 220, 223–24 (S.C. 2016); Brief of the Innocence Network as Amicus Curiae in Support of Petitioner at 18, Simmons v. State, 788 S.E.2d 220 (S.C. 2016) (No. 05-CP-18-1368) [hereinafter Amicus Brief of the Innocence Network]; Blume, *supra* note 11, at 12.

[106] *See Simmons*, 788 S.E.2d at 223, 224 n.10; Amicus Brief of the Innocence Network, *supra* note 105, at 15–18.

[107] *See* Amicus Brief of the Innocence Network, *supra* note 105, at 18.

[108] *See* Mandy Medlock, *Former Death-Sentenced Inmate Wins a New Trial*, JUST. 360 (July 31, 2017), https://justice360sc.org/2017/former-death-sentenced-inmate-wins-new-trial/; *see, e.g.*, Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1471, 1503 (1995); Robert Perske, *The Battle for Richard Lapointe's Life*, 34 MENTAL RETARDATION 323, 323–25 (1996).

[109] *See* Marla Sandys et al., *Taking Account of the "Diminished Capacities of the Retarded": Are Capital Jurors Up to the Task?*, 57 DEPAUL L. REV. 679, 684 (2008).

[110] *See* HUMAN RIGHTS WATCH, *supra* note 31, at 28 ("[P]eople with mental retardation typically find it difficult to recall information that might help an attorney—in part because of problems with memory, in part because they are not able to conceptualize what information might be helpful. The trial lawyer for Johnny Paul Penry, for example, told Human Rights Watch that Penry was unable to answer open-ended questions about his activities on the day of the murder for which he was ultimately convicted. If asked leading questions, Penry would provide inconsistent yes or no responses depending on how the questions were formulated and what Penry apparently believed his attorney wanted him to say.").

pressed for when something happened, he would frequently just pick a day or time at random. Kenneth Simmons' automatic response was "I don't know" or "I don't remember." Eddie Elmore was significantly better at relaying historical events accurately than either Ringo or Kenneth, but even he, when pressed by law enforcement (and later by his own attorneys) as to whether he committed the crime, eventually said that if he did: "he did not remember doing it."[111] While perceived by the police, jurors, and judges as an admission, this was in fact simply the truthful response of someone with compromised intellectual functioning.[112]

We were not able to empirically study the rates at which people with intellectual disability have difficulty assisting counsel because it is not measured in available data and can be difficult to uncover from reading court filings and news articles. The extent to which the intellectual disability interferes in assisting counsel doubtless manifests in different ways based on the individual's skills and weaknesses.[113] This is an important area for future research.

The NRE data does suggest that attorney errors are similarly high for people not identified as having a mental disability and people identified as having intellectual disability.[114] As Table 5 reflects, approximately 25% of all exonerees and 30% of exonerees with intellectual disability had an inadequate legal defense.[115] Despite the similar rates of inadequate legal defenses, the consequences are likely to be more serious for people with intellectual disability as they are likely to have more challenges navigating the legal system.[116] However, these numbers capture only the cases where lawyers misbehaved but not the cases where a more competent client would have been able to muster information that a lawyer could then have used to better defend the client.

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111 *See* Blume, *supra* note 11, at 11.
112 *See* HUMAN RIGHTS WATCH, *supra* note 31, at 11; Blume, *supra* note 11, at 11.
113 *See* HUMAN RIGHTS WATCH, *supra* note 31, at 28; Sandys et al., *supra* note 109, at 684.
114 *See infra* Table 5.
115 *See id.*
116 *See* HUMAN RIGHTS WATCH, *supra* note 31, at 21.

Table 5. Exonerations by Defense and Prosecution Error

	Total $N = 2358$	Any Mental Disability $n = 146$	Intellectual Disability $n = 101$
Inadequate Legal Defense	594 (25%)	47 (32%)	30 (30%)
Official Misconduct	1254 (53%)	97 (66%)	72 (71%)

Note: Data from National Registry of Exonerations. The intellectual disability variable was created by the authors based on information from the NRE.

Interestingly, rates of official misconduct (including misbehavior by police, prosecutors, or other government officials) were somewhat higher where exonerees were individuals with intellectual disability (71% of people with intellectual disability and 53% of all exonerees).[117] This may be related to the fact that individuals with intellectual disability are more susceptible to exploitation, or less likely to assist counsel in uncovering misconduct.[118]

C. Inappropriate Demeanor

The final factor *Atkins* noted as increasing the risk of wrongful conviction for people with intellectual disability is that "their demeanor may create an unwarranted impression of lack of remorse for their crimes."[119]

This factor is not measured in the NRE data and is difficult to find in court filings but extrapolating from our experience, likely is common. In fact, the "demeanor" issue haunts all capital clients.[120] As, the Capital Jury Project interviews revealed, jurors scrutinize capital defendants extremely closely, and often conclude that they lack remorse and even basic human feelings.[121] This is at least in part attributable to the fact that the defendant (often on instruction from counsel) sits in the courtroom staring down, straight-ahead or at the walls, rarely reacting when, for example, crime scene photos are displayed to the jury or gut-wrenching victim-impact testimony

[117] *See supra* Table 5.

[118] *See infra* Part II.D.

[119] Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

[120] *See, e.g.*, Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1600 (1998).

[121] *See id.* at 1619; Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1568–69 (1998) ("[A]n astonishing 85% of death jurors believed that the defendant did not so much as 'even pretend' to be sorry . . . .").

is presented.[122] Too much display of emotion, however, can also harm the defendant with jurors viewing it as faking remorse.[123]

This "damned if you do, damned if you don't" situation, which is very tricky in any capital case, is exacerbated in cases involving persons with intellectual disability.[124] Unfortunately, capital jurors do not judge remorse differently even when they believe the defendant has intellectual disability.[125] While most persons with intellectual disability are deemed competent to stand trial,[126] absent significant (and often unrealistic) accommodations, they rarely are truly able to understand the proceedings. During hours of testimony, defendants with intellectual disability often have little to no idea what the witnesses are talking about (e.g., during the testimony of forensic examiners) and thus are—understandably—bored.[127] For example, Lane Doil asked the judge for crayons so he could color pictures during his trial for murder.[128] It is common for individuals with intellectual disability to try to conceal their disability and pretend they understand, so when they misread the situation they may display inappropriate emotional reactions.[129] Even if they are following the testimony, some people with intellectual disability can struggle with nonverbal behaviors, such as eye contact.[130] In addition, people with intellectual disability may display different symptoms of grief and may have different concepts of death.[131]

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[122] *See* Eisenberg et al., *supra* note 120, at 1617 ("One thing a defendant should not do if he hopes to convince jurors of his remorse is look bored.").

[123] *See* Sundby, supra note 121, at 1569.

[124] *See id.* at 1619.

[125] *See id.* ("[J]urors' belief that the defendant is 'mentally defective or retarded' or 'emotionally unstable or disturbed' bore little relation to their sense that he was remorseful.").

[126] A defendant is deemed competent to stand trial if he (or she) has a rational and factual understanding of the charges and the rational and factual ability to consult with counsel. *See* Dusky v. United States, 362 U.S. 402, 402 (1960). This is a very "low bar," and persons with severe mental illness and mild to moderate intellectual disability are found competent to stand trial every day. *See, e.g.*, Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 421 (1990).

[127] *See* TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 68 (2000), http://texasdefender.org/wp-content/uploads/TDS-2001-StateOfDenial-Ch5.pdf.

[128] *See id.* at 71.

[129] *See* Sandys et al., *supra* note 109, at 684, 692 ("When asked if there 'is anything about the case that continues to stick in mind or that you keep thinking about,' the juror responded, '[The defendant] was laughing when [the jury] handed down [the] sentence. When that happened, hair stood up on the back of my neck, and I knew the man just wasn't right.'").

[130] *See* Erik W. Carter et al., *Factors Influencing Social Interaction Among High School Students with Intellectual Disabilities and Their General Education Peers*, 110 AM. J. MENTAL RETARDATION 366, 375 (2005).

[131] *See* P. Dodd et al., *A Study of Complicated Grief Symptoms in People with Intellectual Disabilities*, 52 J. INTELL. DISABILITY RES. 415, 423 (2008).

Stereotype can also preclude jurors from believing that a defendant has intellectual disability.[132] The general public has limited exposure to individuals with intellectual disability,[133] and people tend to expect them to have vastly lower abilities than are typical.[134] Even experts can misjudge the demeanor of people with intellectual disability.[135] During Ringo Pearson's *Atkins*' hearing, the state's examiner testified that one reason he did not believe Pearson was a person with intellectual disability was his observation of Pearson interacting "normally" with two of the authors during the testimony of a prosecution witness.[136] On cross-examination, he was asked if it would "inform" his opinion to know what Pearson was saying to counsel.[137] When he admitted (as he had to) that it might, he was informed that Pearson was advising counsel that he needed to use the restroom.[138] Jurors too are often skeptical of defendants asserted to have intellectual disability, and when those defendants display deficits, jurors tend to believe the defendants are faking it.[139]

D. Exploitation by Codefendants and Jailhouse Informants

Finally, we note—though *Atkins* did not—that defendants with intellectual disability are more vulnerable to being exploited by codefendants and jailhouse informants.[140] The same vulnerability to suggestion and compliance with authority that makes persons with intellectual disability more likely to confess falsely to crimes they did not commit also makes many such persons more likely to overstate their role in crimes in which they had some part, particularly if a trusted "friend" is urging such an account of the crime.[141] Likewise,

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[132] *See* Sandys et al., *supra* note 109, at 684.

[133] *See* Katrina Scior, *Public Awareness, Attitudes and Beliefs Regarding Intellectual Disability: A Systematic Review*, 32 RES. DEVELOPMENTAL DISABILITIES 2164, 2166 (2011).

[134] *See* Marcus T. Boccaccini et al., *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for* Atkins*-Type Cases*, 34 LAW & PSYCH. REV. 1, 17 (2010); Sandys et al., *supra* note 109, at 693 ("[A] juror from Alabama recalled that the 'defense said defendant was mentally defective but defendant spoke well trying to save his skin.'").

[135] *See* Blume, *supra* note 11, at 11.

[136] *See id.*

[137] *See id.*

[138] *See id.* Pearson tugged on one of our sleeves on two occasions during the testimony. On the first occasion he said: "Mr. John, I have to pee." On the second occasion, he said: "Mr. John I have to pee real bad." *Id.*

[139] *See* Sandys et al., *supra* note 109, at 693 ("Perhaps more than any other reaction, the jurors reported disbelief about the actual [intellectual disability] diagnosis.").

[140] *See* Atkins v. Virginia, 536 U.S. 304, 318–21 (2002); HUMAN RIGHTS WATCH, *supra* note 31, at 15.

[141] *See* HUMAN RIGHTS WATCH, *supra* note 31, at 15 ("People with mental retardation can

when it comes time to make a deal, the person of normal intellectual ability is likely to be the one to be offered, and accept, a plea offer from the prosecution that reduces the charges in exchange for testimony, in part because their testimony is likely to be more persuasive, and hence more valuable to the prosecution.[142]

Interestingly, although the Court did not note this vulnerability to exploitation, it was present in *Atkins*.[143] Daryl Atkins' co-defendant, William Jones, provided law enforcement with a more coherent (but as it turned out, coached) narrative of the offense, while Atkins' account, due to his intellectual disability, was more halting, jumbled and difficult to follow.[144] With no evidence indicating who was the "trigger-man," the prosecution elected to offer Jones a life sentence to testify against Atkins, an offer Jones gladly accepted.[145] It was ultimately revealed that the prosecution failed to disclose the manicuring of Jones' testimony and Atkins was removed from death row because of the possibility that he was not the shooter (a fact required under Virginia law for death eligibility).[146]

Relatedly, a defendant with intellectual disability is often an easy target for a jailhouse informant (aka "snitch") once he is incarcerated; he is more likely than other defendants to be willing to talk to a snitch, more likely to say something incriminating (whether true or not), and less likely to be able to muster convincing evidence that the snitch made up the confession he claimed to have heard (whether he did or not).[147]

Data from the NRE reflect that jailhouse informants are similarly represented in exonerations of people with intellectual disability and people with no evidence of a mental disability; informants play a role in 7% of all exoneration cases and 10% of exonerations of people with intellectual disability.[148] Exonerations of people with intellectual disability were only slightly more likely to include perjury or unsworn false accusations by individuals other than the exoneree (58% of all exonerations and 62% of exonerations of people with intellectual disability).[149] Thus people with intellectual disability are

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fall prey when people with greater intelligence decide to take advantage of them, and they become the unwitting tools of others.").

142 *See id.* at 16.

143 *See Atkins*, 536 U.S. at 307.

144 TASSÉ & BLUME, *supra* note 57, at 37–38, 53.

145 *See id.* at 37.

146 *See id.* at 53–54.

147 *See* Blume et al., *supra* note 71, at 957–58.

148 *See infra* Table 6.

149 *See id.*

only slightly more likely to be exploited by jailhouse informants or other false witnesses than are persons without intellectual disability, but this still is a leading cause of wrongful conviction for all defendants.[150]

Table 6. Exonerations by Other Informants

	Total $N = 2358$	Any Mental Disability $n = 146$	Intellectual Disability $n = 101$
Perjury / False Accusation	1370 (58%)	83 (57%)	63 (62%)
Jailhouse Informant	158 (7%)	14 (10%)	10 (10%)
Co-Defendant Confessed	306 (13%)	34 (23%)	28 (28%)
Group Exonerated	476 (20%)	30 (21%)	23 (23%)

Note: Data from National Registry of Exonerations. The intellectual disability variable was created by the authors based on information from the NRE.

The case of our former client with intellectual disability, Eddie Elmore, is paradigmatic. James Gilliam took the stand at Elmore's three trials and told the jury that, while they were in jail prior to Elmore's trial, Elmore admitted that he sexually assaulted and killed the victim and then "cleaned up."[151] Gilliam's testimony gave the prosecution the clear admission of guilt that Elmore had failed to give during lengthy police interrogation, and also conveniently explained several forensic gaffes and gaps in the prosecution's case.[152] Gilliam later recanted and testified in post-conviction proceedings that the only thing Elmore said during their pre-trial confinement was that he did not commit the crime.[153] His testimony, along with new forensic analysis and evidence that effectively, in the United States Court of Appeals for the Fourth Circuit's view, destroyed the prosecution's case against Elmore, and led to his eventual release.[154] But Gilliam's trial testimony contributed to Elmore's nearly thirty years of imprisonment for a crime he did not commit.[155]

Henry McCollum's case provides another example. McCollum, a nineteen-year-old boy with an IQ of fifty-one, was implicated in the

[150] *See id.*
[151] *See* Elmore v. Ozmint, 661 F.3d 783, 796, 820 (4th Cir. 2011).
[152] *See id.* at 802–03, 821.
[153] *See id.* at 820.
[154] *See id.* at 873.
[155] *See id.* at 785, 802.

rape and murder of an eleven-year-old girl.[156] A teenager told police about a school rumor that McCollum was involved because he looked weird.[157] This tip caused police to interrogate McCollum for over four hours, eventually causing him to confess and implicate four other people including his fifteen-year-old brother Leon.[158] Leon, who had an IQ of forty-nine, also confessed and implicated the others.[159] During the trial, L.P. Sinclair, a seventeen-year-old boy, testified that both brothers had confessed to him.[160] On cross-examination, he admitted that police had interviewed him three times before he implicated them.[161] Later both men were exonerated by DNA evidence that implicated a man who was convicted of a similar crime.[162]

CONCLUSION

This essay builds on our prior work on intellectual disability generally and intellectual disability and innocence in particular. It provides additional quantitative and qualitative support for the Supreme Court's decision in *Atkins*; the Court was right that the enhanced risk of wrongful conviction and execution was an additional reason that persons with intellectual disability should be exempt from the executioner's reach.[163]

Beyond providing empirical support for *Atkins*, the available data raise the disturbing likelihood that wrongful convictions of the persons with intellectual disability are not rare. Post-conviction investigation sufficient to demonstrate innocence is much less likely in noncapital cases than in capital cases, regardless of the intellectual ability of the defendant.[164] Certainly avoiding the execution of innocents is important, but leaving intellectually disabled innocents to languish in prison is also wrong. Thus, not only should *Atkins* be retained, but courts should be vigilant to the possibility of innocence in noncapital cases where there is evidence that the defendant is a person with intellectual disability.

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156 *See* Maurice Possley, *Henry McCollum*, NAT'L REGISTRY EXONERATIONS (Sept. 2, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4492; Order for Relief at 1, State v. McCollum, 433 S.E.2d 144 (N.C. 1993) (No. 83 CRS 11506-07).

157 *See* Possley, *supra* note 156.

158 *See id.*

159 *See id.*

160 *See id.*

161 *See id.*

162 *See id.*; Order for Relief, *supra* note 156, at 3.

163 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

164 *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61 (2008).

APPENDIX[165]

I. MICHAEL ANDERSON (LOUISIANA)

Anderson was charged with a quintuple capital murder. He presented an *Atkins* claim that included IQ scores of 67, 79, 64, and 71, and a finding that he scored more than two standard deviations below the mean on an academic achievement measure. Anderson's *Atkins* claim failed and he was sentenced to death, but his conviction was overturned due to prosecutor misconduct.

Anderson maintained his innocence and claimed the crimes were committed by Telly Hankton. Federal prosecutors said in court and in the press that they believed the crimes were committed by Hankton and not Anderson. Anderson eventually entered an *Alford* plea to manslaughter.

II. RICHARD BAYS (OHIO)

Bays was sentenced to death for a murder in 1995. His conviction was based largely on his confession that was fed to him by police and microscopic hair analysis that has been discredited. Experts testified that Bays meets the criteria for ID. Bays' has I.Q. scores of 74 and 71. He was in special education programs and is unable to hold a job.

On appeal he has raised intellectual disability and *Atkins* claims that are still pending. Hair on the victim and a fingerprint at the crime scene did not belong to the victim or Bays. Bays has denied involvement multiple times and said he only confessed after being

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[165] To find cases that are not necessarily ascertainable through the exoneration lists or other search engines, we asked attorneys for cases where a death sentenced inmate (or a person facing the death penalty at trial) was both determined to be a person with intellectual disability under *Atkins* and either subsequently exonerated, prevailed on a claim and the case was resolved due to doubts about guilt (i.e., through an *Alford* plea), or whose case is currently pending in the state or federal appellate process and there is a substantial question of innocence. Through these contacts, we learned of 45 cases. We excluded cases already reported in previous research and the NRE database. *See supra* Part I. Then we examined the evidence of intellectual disability and innocence by reviewing reported judicial decisions, searching local newspaper archives, and asking attorneys for court filings. In this Appendix, we include cases where (1) there is documented evidence consistent with intellectual disability (e.g. IQ scores below 70 and deficits in adaptive functioning) even if the court did not find that the person has intellectual disability and (2) there is evidence in support of innocence or evidence discrediting the State's main evidence of guilt. The complete database is on file with authors.

told that if he didn't confess he would be executed.

III. MICHAEL BIES (OHIO)

Michael Bies and Darryl Gumm were convicted and sentenced to death in 1992. Their convictions and sentences were overturned when they were found to be mentally disabled and a federal judge ruled they didn't receive fair trials. Bies has a full-scale IQ of 60 and adaptive skills comparable to those of a ten-year old, and he is functionally illiterate.

There was no physical evidence against Bies or Gumm. They were found guilty based primarily on an unrecorded confession following a prolonged, highly suggestive interrogation. The State witheld witness statements that undermined their theory of the crime. Bies accepted a plea to manslaughter and was sentenced to 35 years.

IV. ANDRE BURTON (CALIFORNIA)

Burton was convicted of robbery and murder and sentenced to death in 1983. He has Fetal Alcohol Syndrome and temporal and frontal lobe damage. In addition, neuropsychological testing found cognitive and brain dysfunction and his IQ scores are in the range of intellectual disability.

On appeal, Burton presented an alibi witness and evidence of mistaken eyewitness identification. Burton's former girlfriend stated that he was home with her and two other people at the time of the crime. Witnesses' descriptions of the perpetrator was not close to the race, age, or weight of Burton. Burton's conviction and death sentence were overturned in the Ninth Circuit Court of Appeals in 2016 because Burton was prevented from representing himself at trial.

V. DARRYL GUMM (OHIO)

Along with Michael Bies, Darryl Gumm was convicted and sentenced to death in 1992. Gumm has multiple IQ scores in the range of intellectual disability. Gumm cannot read or write and is functionally illiterate.

Gumm's shoes and palm prints did not match evidence from the crime scene. The State relied on Gumm's confession after a lengthy and suggestive interrogration. The State failed to disclose evidence of another suspect who was seen near the the crime scene at the time of the crime, confessed to multiple people, and had a palm print that

was similar to the one from the crime scene. After Gumm's conviction and death sentence were overturned, he entered a plea to voluntary manslaughter and was sentenced to 35 years in prison.

VI. DANNY LEE HILL (OHIO)

Hill was convicted of murder and sentenced to death based largely on his confession and bite mark evidence. Eighteen-year-old Hill's confession was in response to multiple leading questions by police (and he had no parent or lawyer present). After *Atkins*, Hill appealed his death sentence and presented substantial evidence of intellectual disability including numerous IQ scores in the range of intellectual disability and school and court records indicating he is a person with intellectual disability.

Hill also maintains his innocence and has appealed his conviction, discrediting the expert's testimony regarding bitemark evidence. In addition, Hill's pants had no trace of blood despite the crime scene being very bloody. Hill's *Atkins* and innocence claims are still pending in the Sixth Circuit Court of Appeals.

VII. JOSEPH JEAN (TEXAS)

Jean was convicted of murder and sentenced to death in Texas. His conviction was largely based on inaccurate eyewitness testimony and his confession, which was in response to multiple interrogations. He has raised *Atkins* and innocence claims on appeal. His IQ score is 69, he scored within the range of intellectual disability on an adaptive functioning measure, and he attended special education. The eyewitness testimony placing him at the scene of the crime was discredited by red light camera footage. In addition, Jean's DNA did not match a sample from the victim (or was at best inconclusive).

VIII. JESSE LEE JOHNSON (OREGON)

Johnson was convicted of murder and sentenced to death. On appeal he has raised *Atkins* and innocence claims. He has IQ scores of 72, 81, and 77 and is diagnosed with Fetal Alcohol Spectrum Disorder. Throughout the trial, Johnson maintained his innocence and rejected a plea offer. Johnson was excluded from DNA found at the crime scene, which matched another man. The trial judge found that two lead detectives on Mr. Johnson's case "both lied or intentionally misrepresented critical facts in both their sworn

testimony before the court and in sworn affidavits."

IX. FLOYD MAESTAS (UTAH)

Maestas was convicted of murder and sentenced to death. Maestas' *Atkins* claim failed despite presenting two experts who testifed that he was a person with intellectual disability. The court found that Maestas failed to demonstrate a causal relationship between his deficits in intellectual functioning and his deficits in adaptive functioning, even though this is not required by the AAIDD or APA. Maestas maintained his innocence and said he was framed. On appeal, he presented evidence that the people who framed him admitted it to witnesses and the DNA evidence used against him was unreliable. Maestas lost his appeal in the Utah Supreme Court and died on death row before these issues were resolved in Federal Court.

X. ROBERT NELSON (SOUTH CAROLINA)

Nelson was charged with murder after he confessed to being present while several men robbed and killed the victims. Nelson, who was a teenager at the time of the crime, said that one of the men held a gun to his head during the crime. Fearing retaliation from the men he implicated, Nelson later retracted his statement and gave a full confession in which he claimed that he acted alone.

Initially, the State filed a notice to seek the death penalty, but withdrew the notice after the South Carolina Department of Disabilities and Special Needs found Nelson was a person with intellectual disability. Nelson reads at a fourth grade level, has an IQ in the 60s, and scored in the lowest percentile in an adaptive funcitoning measure.

Nelson was found guilty and sentenced to 52 years' imprisonment. Nelson appealed his conviction, claiming that his confession was undermined by conflicting accounts and a detective admitting to suggesting details to Nelson during multiple interrogations. DNA from the crime scene, including victim's fingernail scrapings, did not belong to Nelson. Ultimately, Nelson withdrew his appeal and accepted a plea.

XI. JOHNNY RINGO PEARSON (SOUTH CAROLINA)

Pearson was charged with rape and murder in 1995. At an *Atkins* hearing, Pearson presented IQ scores in the 60s and evidence that he attended special education and was unable to advance beyond fifth

grade in school. In addition, Pearson was unable to maintian employment and an expert testified that his living skills were equivalent to those of an eight-year-old. The judge ruled that Pearson was a person with intellectual disaility and could not be sentenced to death.

Pearson's confession did not match physical evidence nor the prosecution's theory of the case. The other evidence against him, snitch testimony and duct tape from the scene "matching" a role of tape in his car, was also discredited. Pearson accepted an *Alford* plea and was released from prison before he questioned this evidence at trial.

XII. GEORGE PORTER (IDAHO)

Porter was convicted of murder and sentenced to death. During a Post-Conviction Relief hearing, a clinical neuropsychologist testified that Porter is intellectually deficient and has an IQ near 70.

Porter maintains his innocence and presented evidence that he was excluded from DNA discovered on the weapon at the crime scene. Porter accepted an *Alford* plea before a court ruled on his innocence and *Atkins* claims. Porter, who had been on death row, was released as a result of the plea.

XIII. KENNETH SIMMONS (SOUTH CAROLINA)

Simmons was convicted and sentenced to death in connection with the rape and murder of an eighty-seven year old woman. Simmons' death sentence was vacated when the PCR court found he was a person with intellectual disability. Simmons was interrogated multiple times and eventually "confessed" to the murder (and three other murders which were determined to be fictional). DNA found at the scene did not match Simmons. Simmons' conviction was ultimately vacated.

XIV. MANUEL VELEZ (TEXAS)

Velez was convicted of the murder of his girlfriend's one-year-old son and sentenced to death. Velez has an IQ of 65 and reads below the second grade level in English and at the Kindergarten level in Spanish. During a habeas hearing, Velez presented evidence that he was not with the victim when he was injured, and it was the victim's mother who inflicted the fatal injuries. Family members and neighbors testified that they witnessed the victim's mother abuse and

neglect him. Velez's conviction was overturned because he received an inadequate defense. Ultimately, he entered a plea for failing to report child abuse.

XV. RUSSELL WEINBERGER (PENNSYLVANIA)

Facing a possible death sentence, Weinberger plead guilty to murder in 1985. He agreed to testify against his co-defendant, Felix Rodriquez, who had previously confessed and implicated Weinberger. Weinberger had an IQ between 60 and 65. He could not read or spell and had been in special education. The real killer, Anthony Sylvanus, was identified through a fingerprint database and made a full confession in 2001, more than 20 years after the murder. Weinberger and Rodriquez were released after serving 21 years in prison.

XVI. COREY DEWAYNE WILLIAMS (LOUISIANA)

Williams was convicted of the murder of a man who was delivering pizza. He was sentenced to death in 2000 based primarily on the testimony of eyewitnesses and his own confession. Williams, who was 16 at the time of the murder, had IQ scores of 68, 65, and 69. He scored in the range of intellectual disability on an adaptive functioning measure and was in special education starting at age 9.

Eyewitnesses initially said they saw several older men—and not Williams—steal from the victim and that it could not have been Williams who committed the murder. In addition, investigating police officers did not believe Williams was the murderer untill he confessed. Williams accepted and *Alford* plea and was released. As part of his deal, Williams had to plead guilty to obstruction of justice for his false confession.

XVII. DAVID WOOD (TEXAS)

In 1992, Wood was convicted of the serial murders of six young women based largely on the testimony of jailhouse informants. Wood's *Atkins* claim was denied despite substantial evidence including IQ scores of 64, 71, and 75. Wood failed first grade, third grade, and ninth grade and eventually dropped out in ninth grade at the age of 17. He also attended special education classes.

Police logs indicate that Wood had no contact with the victims on the days some of them disappeared. In addition, DNA from the crime scene, including the victim's clothing, did not match Wood. A

jailhouse informant received reward money ($26,000) and a sentencing deal for testifying against Wood. Wood has been on death row for 25 years and is still appealing his conviction.

XVIII. ROBERT YOUNG (CALIFORNIA)

Young, who was 20 at the time of the crimes, was convicted of the murder of three men who were shot to death in separate incidents over a three-week period in 1989. He was sentenced to death.

During the sentencing phase of his trial, an expert testified that Young had an IQ of 75, the educational skills of a 9 year old, and performed below the fourth grade level in a measure of academic achievement. Young had learning and adjustment problems since Kindergarten and dropped out of school in ninth grade.

On appeal, Young presented evidence that he was too injured on the day of the crime to have committed the offense. In addition, he presented evidence discrediting the witnesses who testified against him. In 2015, Young's conviction was vacated because of juror misconduct. The State did not retry him and dismissed the charges.